IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 316 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SURJAN UKHADIYABHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR CHIRAG M PAWAR for Appellant
MR AJ DESAI, ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 05/10/2007

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. The sole appellant (original accused No.3) has preferred this appeal under section 374 of the Code of Criminal Procedure, 1973 (in short “the Code”) challenging the judgement and order dated 26.2.1999 passed by the Learned Additional Sessions Judge, Valsad, Camp Navsari, in Sessions Case No.84 of 1996, whereby the appellant has been convicted for the offence punishable under section 302 of the Indian Penal Code, 1860 (in short the IPC) and sentenced to imprisonment for life and a fine of Rs.3000/- and in default to undergo two years imprisonment. The appellant has further been convicted for the offence punishable under section 324 IPC and sentenced to rigorous imprisonment for two years and a fine of Rs.1000/- and in default to undergo three months imprisonment. It has been further directed that the both the sentences shall run concurrently.

2. The case of the prosecution is that the first informant Kanubhai Singabhai Gamit had lodged a complaint with the Vaghai police station that at about 5:30 in the evening on 3.3.96, he, along with Kunverji Jivu, Suresh Manu and Devram Akhatiya had gone to Chunilal Khandu’s shop near the Jhavda bus-stand where they sat together and had sodas and stayed for about an hour. Thereafter the four of them set off to go their village and were walking on the road

passing in front of the Jhavda Bus stand. When they reached behind the cabin, Surjan Ukhadia Gamit (the appellant herein), Rajnikant Surjan Gamit and Karsan Kalujya Konkani, who were hiding behind the Forest Department saplings, came there. Amongst them, Surjan Ukhadiya had an axe in his hand, Rajnikant Surjan had a stick in his hand and Karsan Kalujya had a dharia in his hand. At that time Surjan struck Kunverji Jivu Konkani (hereinafter referred to as “the deceased”) who was walking ahead of them, on the head with an axe, whereupon he asked him “uncle what are you doing?” but he did not say anything and continued to assault Kunverji. Thereafter Rajnikant Surjan dealt a stick blow on the head Suresh Manu Konkani who was coming behind them and Karsan Kalujya struck him on the head with the dharia whereupon his head started bleeding. Karsan Kalujya also struck him on the head with the end of the dharia injuring him near the left ear. Meanwhile Rajnik Surjan also struck Devram Akhatubhai of their village, who was coming behind them, on the head with the stick that he was wielding. At that time his father Akhatu Janubhai intervened to rescue him and put his hand across whereupon, Surjan Ukhadia Gamit struck him on the palm of his right hand with the axe resulting in the palm being cut and his hand started bleeding heavily. At that time Kunverjibhai and Sureshbhai fell down in a profusely bleeding condition, whereupon

Khimchand Dhedha Konkani of their village came there with a gun in his hand and threatened to kill all of them. Consequently he was afraid that they would kill him also, hence he ran towards his home through Bavaji’s sugarcane and went to Kunverji’s house and informed his father and then went to Suresh’s house where his wife Marliben was present and told her that Suresh had been injured. He was coming along with her to the scene of occurrence, when they met Suresh on the road, coming from the opposite side. He had been injured on the head and was bleeding hence, he and Suresh’s father Manu Radku as well as Shukkar Kunverji of their village together went to Rustomji Bavaji’s place and requested him for his jeep to take the injured to the hospital. At that time Kunverji’s wife and his family members were crying hence, it appeared that Kunverji had expired. They seated Suresh and Akhatu Janu in the jeep and along with Dhanji Ukhadiyabhai Gamit, Police Patel of their village took them to the Vyara Referral Hospital for treatment, where both the injured were admitted for treatment. On inquiring at the hospital, it was learnt that as the incident had taken place within the limits of Vaghai Police Station in Dang District, they would have to go there to lodge the complaint. Hence, he went directly from Vyara to lodge the complaint.

3. The First Information Report was lodged on 4.3.96 at 7:00 hours and was registered as Vaghai Police Station I C.R. No.18/96 for the offences under sections 302, 307, 324, 323, 502 and 34 IPC, section 25 (c) of the Arms Act and section 135 of the Bombay Police Act. After registering the offence, Babulal Chedilal Sharma, P.S.I. took charge of the investigation. He held inquest on the dead body of the deceased in the presence of panchas and drew panchnama Exh.12. Thereafter he drew panchnama of the scene of offence (Exh.22) in the presence of panchas. From the scene of offence, the Investigating Officer collected steel strips, two bamboo sticks, control earth and bloodstained earth and a pair of slippers. He thereafter recorded statements of witnesses. He went to the Vyara Hospital and seized the bloodstained clothes of injured Suresh Manu in the presence of panchas. On receiving the post mortem report, the same was kept in the investigation file. The bloodstained clothes of another injured, Akhatu Janu, were seized from Surat Civil Hospital in the presence of panchas. The accused were arrested on different dates and arrest panchnamas were drawn in the presence of panchas. As there was sufficient evidence against the accused, J.C. Patel (P.S.I.) had submitted charge sheet in the court of the learned Judicial Magistrate First Class, Vansda-Ahwa, at Vansda, which was registered

as Criminal Case No.112/96. In all there were six accused persons.

4. As the offence under section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned Magistrate vide order dated 16.7.1996 committed the case to the Sessions Court, Valsad, under section 209 of the Code of Criminal Procedure, 1973 where it was numbered as Sessions Case No.84/96.

5. The learned Additional Sessions Judge, Valsad at Navsari Camp at Valsad to whom the case was made over for trial framed the charge at Exhibit 2, against all the accused for the offences punishable under sections 143, 147, 148, 149, 302, 307, 324, 323 and 506(2) of the Indian Penal Code and 135 of the Bombay Police Act whereas Accused No.1 alone, was also charged for the offence under section 25(c) of the Arms Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

6. During the course of trial the prosecution examined in all fourteen witnesses, including four eye witnesses of the occurrence and filed some documentary evidence. With a view to avoid prolix, the names of the witnesses and the details of the documentary evidence are not enumerated herein and the relevant evidence will be referred to hereinafter, as

and when necessary. At the end of trial the incriminating circumstances appearing in evidence against the accused were put to them. The accused in their statement under section 313 of the Code denied the case of the prosecution and pleaded that they had been falsely implicated. However, the defence neither led any evidence nor examined any witnesses.

7. The learned Additional Sessions Judge, at the end of trial, after hearing the learned Advocates appearing on behalf of the respective parties and appreciating the evidence on record, found that the prosecution had not been able to prove the presence of accused No.2 and 6 at the scene of offence beyond reasonable doubt. The learned Judge also found that it was doubtful as to whether accused No.1 was present at the scene of offence right from the beginning. The learned Judge also found that the charge under section 25(c) of the Arms Act, which was levelled only against accused No.1, was not proved. Accused No.1, 2 and 6 were accordingly given benefit of doubt and acquitted. In the light of the aforesaid, the learned Judge was of the view that the prosecution has not been able to establish the presence of five or more accused persons during the commission of the offence, hence, the prosecution has not been able to

prove the formation of an unlawful assembly and that the charge under section 149 IPC has not been established. The learned Judge also found that the charge under section 135 of the Bombay Police Act was not proved against any of the accused. Insofar as the remaining accused are concerned, the learned Judge held that insofar as accused No.3 (i.e. the present appellant) is concerned the prosecution has proved the charge under section 302 and 324 IPC against him and accordingly convicted him for the same and sentenced him as mentioned in paragraph (1) hereinabove. Whereas insofar as accused No.4 and 5 are concerned the learned Judge held that the charge under section 323 IPC has been established against them and convicted them for the said offence and sentenced them to rigorous imprisonment for two months and a fine of Rs.500/- and in default to undergo further imprisonment for 15 days.

8. Being aggrieved by the aforesaid order of conviction and sentence the appellant has preferred the present appeal. At this juncture it may also be noted that the State has not preferred any appeal against the acquittal of the other accused. Hence, this appeal is confined to the question as to whether the appellant has been rightly convicted for the offence under section 302 and 324 IPC.

9. Learned Advocate Mr. Chirag Pawar has vehemently assailed the impugned judgement and order. He has submitted that the complaint lodged at Vaghai Police Station cannot be said to be the First Information Report as the complainant had first gone to the Vyara Police Station and had disclosed the commission of the offence. However, the Vyara Police Station did not record the complaint but relegated them to the Vaghai Police Station after which the complaint had been lodged at the Vaghai Police Station. He has submitted that in the circumstances the FIR Exh.41 cannot be said to be the first information report regarding the incident and hence ought not to have been treated as such.

9.1 Learned advocate for the appellant has further submitted that from the scene of offence panchnama as well as the evidence of the witnesses it has come out that there was dust at the scene of offence. However, neither the inquest panchnama nor the postmortem report shows any sign of dust on the person of the deceased. Hence, the scene of offence itself is doubtful. He has further submitted that according to PW-8 and PW-9, the complainant Kanu Singa had a bicycle with him, whereas no such bicycle has been found at the scene of offence, which raises a doubt regarding the prosecution story.

9.2 Learned advocate for the appellant has further submitted that the medical evidence is not in consonance with the ocular evidence, because as per the say of the eyewitnesses the appellant had inflicted two blows with the axe on the head of the deceased, whereas according to the doctor there was only one incised wound on the head. It was accordingly submitted that the aforesaid discrepancy raises a doubt against the very presence of the said witnesses at the scene of offence. He has further submitted that the discovery panchnama has not been proved, nor has the prosecution obtained the report from the Forensic Science Laboratory. He has accordingly submitted that there are serious lapses in the investigation of the case and the prosecution has not been able to establish the charge against the appellant beyond reasonable doubt. It was accordingly urged that the impugned judgement and order of conviction and sentence be set aside and the appellant be acquitted.

9.3 Lastly it was submitted that that even if the prosecution case is to be accepted, having regard to the fact that this was a case of only a single blow which proved to be fatal, the offence committed would be

one amounting to culpable homicide not amounting to murder. Therefore, if at all the conviction is to be upheld the same should be converted to one under section 304 part II - I.P.C.

10. On the other hand Mr. A.J.Desai, learned Additional Public Prosecutor has supported the impugned judgement and order. He has submitted that the prosecution has successfully established the charge against the appellant through the evidence of as many as four injured eyewitnesses. He has further submitted that lapses on the part of the investigating agency if any, cannot invalidate the prosecution case, which is established on the basis of strong and clinching evidence. Learned Additional Public Prosecutor has submitted that when the prosecution has proved the charge against the appellant through the evidence of eyewitnesses, circumstantial evidence in the form of discovery or recovery of weapons etc. pales into insignificance. Replying to the contention that the offence in question is one under section 304 Part II IPC, he has submitted that in this regard the choice of weapon, the part of the body on which the blow is inflicted and the intensity of the blow are all relevant considerations. He has submitted that the appellant was armed with an axe and had inflicted the blow on the head, which is a vital part of the body with

considerable force; hence, the intention to kill is evident. Hence, the appellant is not entitled to the benefit of section 304 Part II IPC. In conclusion, he has submitted that the appeal being totally devoid of any merit deserves to be dismissed and the order of conviction and sentence requires to be confirmed.

11. We have considered the rival submissions advanced by the learned counsel appearing for the parties and have carefully examined the record of the case and have perused the impugned judgement.

12. Insofar as the death of the deceased being a homicidal one, the same has not been disputed by the learned Advocate for the appellant, hence, we need not discuss the same in detail. Suffice it to say that the prosecution has succeeded in establishing that the death of the deceased was a homicidal one through the evidence of PW 3 Dr. Jagdeepbhai Ishwarbhai Patel who has been examined at Exh.27 as well as the Post Mortem Note Exh.28 and the Inquest panchnama Exh.12. According to this witness while conducting the autopsy on the body of the deceased, he had noted the following external injuries: (1) vertical incised wound over occipital region of skull 5 cm extending from cerebral situreus size 5 x 2 cm x brain matter deep. Brain seen from wound. (2) CLW on

(LF) side parietal region of scalp size 3 x 1 cm x muscle deep oblique direction, (3) Abrasion on (RT) side of forehead size 3 x 2 cm (4) Abrasion on (LF) elbow joint- size 5 x 1 cm. In his opinion, all the injuries were ante-mortem in nature and the cause of death was due to shock due to intra cranial haemorrhage due to head injury. In his opinion injury No.1 was sufficient to cause death in the ordinary cause of nature. This evidence is sufficient to arrive at the conclusion that the death of the deceased was a homicidal death. Hence, we agree with the finding recorded by the trial Court that the deceased died a homicidal death and confirm the said finding.

13. In the background of the aforesaid facts, we may now examine the culpability of appellant as regards the charge under section 302 and 324 under which he has been convicted.

14. Before examining the contentions raised by the learned counsel for the parties, it is necessary to briefly refer to the evidence, which has been adduced by the prosecution.

15. We have already referred to the testimony of PW 3 Dr. Jagdeepbhai Ishwarbhai Patel who conducted the autopsy on the dead body of the deceased. According to this witness the cause of death was due to shock due to intra cranial

haemorrhage due to head injury. In his opinion external injury No.1, namely the vertical incised wound on the occipital region, was sufficient in the ordinary course of nature to cause death. He has also stated that the said injury could be caused by a sharp cutting instrument. This witness has been subjected to a detailed and searching cross-examination. Various questions were put to him to suggest that no dust was found on the wound, that more injuries were noted in the inquest panchnama than those noted in the postmortem report. However, nothing substantial has been elicited to corrode the credibility of this witness. This witness has emphatically denied the suggestion that injury No.1 could not be caused by an axe. In his cross examination he has stated that looking to injury No.1 the same must have been inflicted from behind. Through the evidence of this witness, the prosecution has proved that the deceased had died a homicidal death, which had been caused by injury No.1, which in turn could have been caused by an axe.

16. Coming to the ocular evidence, the prosecution examined four injured eyewitness, namely, PW 7 Kanubhai Singabhai, PW 8 Sureshbhai Manubhai Konkani, PW 9 Devram Akhatu and PW 10 Akhatubhai Janubhai. In his testimony before the Court PW 7 Kanubhai Singabhai has corroborated the version given

by him in the FIR and stated that at the time of the incident he was at Jhavda village. At that time Kunverji Jivu, Suresh Manu and Devram Akhatiya were with him, and they had all gone to the Jhavda village bus-stand. They had spent about an hour at the bus-stand and had started off towards their village Pipalvada at about 6:30 in the evening. He has further deposed that while they were going Surjan Ukhadia, Rashmikant Surjan and Karsan Kalu came out from the Forest Department saplings. Surjan Ukadia had an axe, Rajnikant had a stick and Karsan had a dharia (scythe). At that time Surjan Ukhadia struck Kunverji on the head with the axe whereupon he asked Surjan what he was doing. Meanwhile Rajnikant dealt a blow on the head of Suresh Manu who was behind Kunvarji, and Karshan inflicted a blow with the dharia on Suresh’s head. Rajnikant dealt a stick blow on Devram Akhatiya who was coming behind Suresh, whereupon his father (Akhatiya) put his hand across to save him, and Surjan dealt a blow with the axe on Akhatiya’s hand. This witness has also deposed that Khimchandbhai Dhedhabhai was also standing there with a gun and had told them to kill all of them. He was afraid that they might also kill him, therefore, he ran home thorough Bavaji’s field. While going to his house, Kunverji’s house comes in between, hence he had informed Kunverji’s father. From there he had gone to Suresh’s

house and informed his wife that Suresh was lying in a bleeding condition. He was coming to the place of occurrence with Suresh's wife, when they found Suresh lying on the road in a bleeding condition, on seeing which, they had gone to a Parsi's place to fetch a jeep and had prepared to take Suresh, Devram and Akhatiya to the hospital. According to this witness the cause of the incident was that in the previous year Suresh Manu's wife had won the panchayat election whereas Khimchand's wife had lost the election. He has further deposed that they had taken Suresh, Devram and Akhatu to the Government hospital at Vyara, however, the hospital authorities refused to admit the injured and had asked them to call the police hence they had called the police. Moreover, the Vyara Police Station had not recorded their complaint and had told them that the incident was of Dang District; hence they should go to Vaghai Police Station. Thereafter they had gone to Vaghai Police Station and lodged the complaint. He has admitted the contents of the FIR Exh.41 and has identified his signature thereon. He has also identified the muddamal article No.10-stick, No.10-axe and No.20-dharia as the weapons used by the accused in the commission of the offence. He has also identified muddamal article No.17-gun that was held by Khimchandbhai. He has also deposed that he had been struck by Karshanbhai with the handle of

the dharia and was injured near the left ear. He had been given treatment and the police had recorded his further statement. This witness has been cross-examined at length, however nothing substantial has come out to shake his credibility. This witness has adhered to the version stated in the complaint.

17. The next eyewitness is PW 8 Sureshbhai Manubhai Konkani who has been examined at Exh.42. According to this witness the incident had taken place on 3.3.96 at about 5:30 in the evening at a distance of 90 feet from the Jhavda Bus stand on the road going towards Pipalwada from Jhavda Bus stand. At the time of the incident he, Kanu Singa, Devram and Kunverji were going to their village. At the time of the incident Kanu was pulling his cycle and walking and deceased Kunverji was walking along with his hand on the carrier and he and Devram was walking near Kunverji. While they were walking, Surjan, Khimchand, Karshan, Rajni, Ramesh and Darji Manji who were hiding in the saplings of the Forest Department nursery, came out and surrounded them. Surjan had an axe in his hand, Rajni had a stick in his hand, Karshan had a dharia in his hand, Ramesh had a bamboo stick in his hand and Khimchand had a gun in his hand. After surrounding them, Surjan inflicted a blow with the axe on Kunverji’s head due to which he had fallen down. Thereafter firstly Rajni had

dealt a blow with a stick on his (this witnesses') head and thereafter Karshan had dealt a blow with a dharia on his head. At that time the complainant Kanu had asked Surjan as to why they had launched the assault. Hence, Karshan ran and struck a blow with the dharia on Kanu's head behind his ear. This witness has further deposed that due to the injury he did not know as to where Kanu had gone leaving his cycle behind, as other persons had pounced to beat him. Devram had come to rescue him. Meanwhile he had escaped from the hands of Khimchand and fallen into the hands of Karshan, Rajni and Ramesh. At that time Surjan had brandished the axe three times to strike Devram, but he had dodged the blows hence, he was not hit by the blows. At that time Rajnik had dealt a stick blow on Devram's head whereupon Devram's father Akhatu had come there and asked him as to why they were assaulting his son. At that time Surjan took the axe and went to hit Akhatu, whereupon Akhatu put forward his hands, hence, the axe struck his palm. Everyone was belabouring him, hence, he did not know as to who assaulted with what, and he had become unconscious. He has further deposed that he did not know as to how he had come out of the spot, but he himself had come out, and it had not happened that some one else had taken him out. When he was coming on the Pipalvada road he had met Kanu, his wife and his father. His wife had

made him lie down on the verandah of Dinesh Jaysinh’s house. He does not know that he had been taken to the hospital in a jeep, because he had become unconscious. The police had questioned him on the next day. He has further deposed that the cause of the incident was because during the election held prior to the incident his wife had won the election whereas Khimchand’s wife had lost the election. Due to animosity on that account, the incident had taken place. He has identified the muddamal articles No.10-stick, No.17-gun, No.19-axe and No.20-dharia. This witness has also been extensively cross-examined, but he has successfully withstood the same. Resultantly, his testimony remains unimpeachable.

18. The third eyewitness is PW 9 Devram Akhatu who has been examined at Exh.43. This witness has deposed that as the accused belong to their village he knew them. According to him the incident had taken place on 3.3.96 at 5:30 in the evening near the Forest Department nursery. At the relevant time he, Kunverji, Kanu Singa and Suresh were going towards their village on foot. Kanu Singa had a bicyle and Kunverji was walking with his hand on its governor. He and Kanu were behind Kunverji. Suddenly, Surjan with an axe, Rajnikant with a stick, Karshan with a dharia, Ramesh with a baton, Khimchand with a gun and steel strips, in all six persons came out and encircled

them. Surjan dealt a blow with the axe on Kunverji's head, hence he fell down. On his falling down, Rajnikant and Ramesh with sticks and Karshan with a dharia fell upon Kunverji. At that time Surjan, Ramesh, Karshan, Rajnikant and Khimchand Dhedha ran to assault Suresh. Suresh was assaulted. Karshan had inflicted one blow with the handle of the dharia on the backside on Kanusinga's head below the left ear. Dharia blows were inflicted on Suresh's head and other parts of his body. He had intervened to save Suresh Manu, whereupon Surjan had rushed towards him with the dharia and had raised it to hit him three times, but he had dodged the same, hence he was not hurt. Meanwhile, Rajnikant inflicted a blow on his head behind the left temple with a stick and his father had come to rescue him. His father had told Surjan not to beat his son. At that time, Surjan struck a blow on his head with the blunt side of the axe and struck his father on his right hand near the thumb with the axe. He has further deposed that he had run away from the scene of incident. While running away, he had seen that Khimchand had a gun and steel strips in his hand and was hitting Suresh Manu with the steel strips. After fleeing from the spot, he had gone to tell Dhanji Patel about the incident and upon Dhanji asking him as to what had happened, he had told him that Surjan had done away with Kunverji. He had told

Kunverji's father that Surjan, Rajnikant, Karshan had done away with Kunverji and he was lying in a heavily bleeding condition. Thereafter, he had told Kunverji's wife Savita that Kunverji had been done away with. He had gone and told Manubhai that Kunverji had been done away with and Suresh had also been assaulted, but he did not know where he had run away. This witness has further deposed that thereafter he and Radku had set out to go to the scene of occurrence. He had also told Shukkarji that Kunverji had been done away with and that Suresh had run away somewhere and that they should all go to the scene of occurrence. Thereafter, they had gone to the scene of occurrence and from there while going in search of Suresh they had gone towards Dinesh Jaisinh's house. There Suresh was made to lie down on the verandah in a heavily bleeding condition and they had taken him in a jeep to Vyara. He has further deposed that the police had recorded his statement and that he could identify the muddamal weapons. He has identified Muddamal article No.11, 10, 17, 19 and 20 and has stated as to which accused was wielding which weapon. This witness has also been subjected to detailed and lengthy cross-examination; however, the core of his testimony has remained unimpeachable.

19. The fourth eyewitness is PW 10 Akhatubhai Janubhai who has been examined at Exh.45. This

witness had deposed that he knows Kanusinga, Suresh Manu and Dhanji Ukhad whereas Devram is his son. He also knows the accused. According to this witness, the incident took place on 3.3.96 at Jhavda village at 6:30 in the evening, near the Forest department nursery. He was going to a Parsi's shop. When he came to the place, Kunverji, Suresh, Kanusinga and Devram were sitting at Chunilal's shop. The accused had come out of the Forest Department Nursery and had surrounded Suresh, Kanu, Devram and Kunverji. Surjan Ukhadiya had struck Kunverji on the head with a dharia. Khimchand Dhedha had caught hold of Suresh Manu by the nape of his neck, whereupon Devram intervened to save him. Surjan ran towards Devram with the axe, whereupon he had told Surjan not to beat his son and raised his hand to ward off the blow, whereupon Surjan had struck the axe on his hand, and he had been injured on the thumb of his right hand. This witness has further deposed that Karshan Kalujya had struck Kanusinga with the dharia; Rajnikant had hit Devram with a bamboo stick above his ear, whereas he had sustained injury on the hand; hence, he sat down on the road. He has further deposed that Kunverji had been killed and Suresh had been injured on the head and that Khimchand had hit him with steel strips. Then, Suresh Manu and Devram had run away. Thereafter, he had gone home and from his house, his wife and Suresh's father had

brought him to the bus-stand at Jhavda village and had brought a Parsi’s jeep and taken him to Vyara. He has also identified the muddamal weapons and stated as to which accused was holding which weapon. This witness has also been cross-examined at length, however, the defence has not been able to bring out anything to discredit his testimony.

20. To prove the injuries sustained by the PW 9 Devram Akhatu, the prosecution has examined PW 4 Dr. Babulal Ravjibhai Panchal who had given treatment to the said witness. He has produced and proved the injury certificate Exh.32. To prove the injuries sustained by PW 10 Akhatubhai Janubhai, PW 7 Kanubhai Singabhai Konkani and PW 8 Sureshbhai Konkani the prosecution has examined PW 5 Dr.Maheshbhai Ramanlal Choudhary at Exh.33. This witness has also produced and proved the injury certificates Exh.34, 35 and 36.

21. The prosecution has also proved the scene of offence panchnama Exh.22 through the testimony of PW 1 Jayantibhai Parbhubhai Patel who is a panch witness and has been examined at Exh.21. This witness has fully supported the prosecution case. The place of occurrence as described in the panchnama fully supports the version given by the eyewitnesses as regards the place of occurrence.

22. In the present case, the incident took place at about 5:30 to 6:30 p.m. on 3rd March, 1996. At this time of day in the month of March, there would be sufficient daylight and as such the witnesses must have seen and identified the assailants who were all residents of the same village Pipalvada and were very well known to them. The four eyewitnesses examined by the prosecution namely PW 7 Kanubhai Singabhai, PW 8 Sureshbhai Manubhai Konkani, PW 9 Devram Akhatu and PW 10 Akhatubhai Janubhai are injured witnesses and, therefore, no doubt can be raised about their presence on the scene of occurrence. Insofar as the involvement of the present appellant in the commission of the offence is concerned, each of the four eyewitnesses has consistently maintained that the appellant Surjan had struck deceased Kunverji on the head with an axe. Hence, all the witnesses have given a consistent version insofar as the involvement of the appellant is concerned. Thus, the evidence on record establishes the case of the prosecution insofar as the involvement of the present appellant is concerned.

23. Now we may consider the evidence of the eyewitnesses in the light of the medical evidence, to determine the extent of culpability of the appellant in the crime in question. From the evidence of PW 3 Dr. Jagdeepbhai Ishwarbhai Patel it has been

established that the cause of death was due to shock due to intra cranial haemorrhage due to head injury; that external injury No.1, namely the vertical incised wound on the occipital region, was sufficient in the ordinary course of nature to cause death and that the said injury could be caused by a sharp cutting instrument. The consistent version of the four eyewitnesses is that the appellant had struck a blow on the head of the deceased with an axe. Hence, it has been established beyond reasonable doubt that the appellant was the author of injury No.1 that has resulted in the death of the deceased. Therefore, the charge against the appellant under section 302 IPC has been duly established by the prosecution.

24. Insofar as the charge under section 324 IPC is concerned, the prosecution has examined PW 5 Dr. Maheshbhai Ramanlal Choudhary at Exh.33. This witness had stated that on 4.3.96 he was discharging duties as Medical Officer at Vyara when at about 12:30 at night three persons namely, Akhatubhai Janubhai, Kanubhai Singabhai Konkani and Sureshbhai Manubhai Konkani had come for treatment along with a police yadi. He has deposed that on examining Akhatubhai he had noted the following injuries:

1. Incised cut wound on right hand. Dorsally at 1st web space about 6 x 3 x 1

½ cm muscle and bone deep active bleeding oblique. Blood clots in the wound.

2. Incised cut would on right hand palmar aspect about 3 x 1 x 1 cm oblique active. Bleeding muscle deep. Blood clots in the wound.

He has further deposed that the patient was referred to the Civil Hospital Surat for further treatment of the said injuries. He has produced the injury certificate at Exh.34.

25. On a conjoint reading of the testimonies of PW 9 Devram Akhatubhai and PW 10 Akhatubhai Janubhai, it is clearly established that it was the appellant alone who had inflicted a blow on Akhatubhai’s hand with the axe. Besides this injury is in the nature of an incised cut wound. Hence, the ingredients of section 324 IPC are duly satisfied in that the injury has been caused by a cutting instrument, which, used as a weapon of offence, is likely to cause death. Hence, the learned Judge has rightly convicted the appellant for the offence under section 324 IPC.

26. Learned Counsel for the appellant has contended that the FIR Exh.41 cannot be

treated as a first information report inasmuch as the complainant had first approached the Vyara Police Station where he had narrated the entire facts and thereby given information regarding a cognizable offence, however, the complaint was not recorded at the said Police Station, instead they were relegated to the Vaghai Police Station to lodge the complaint. There is no merit in the said contention inasmuch as the prosecution case cannot be thrown out merely because the Vyara Police Station, which falls within Surat District, refused to register the complaint on the ground that the incident had taken place within the jurisdiction of the Vaghai Police Station, Dang District.

27. The next contention raised by the learned Counsel for the appellant is that the ocular evidence is not consistent with the medical evidence in that the eyewitnesses have stated that the appellant had inflicted two blows with the axe on the head of the deceased, whereas according to the doctor there was only one incised wound on the head of the deceased. This contention also does not merit acceptance in that by and large all the four witnesses in their examination in chief have stated that the appellant had inflicted a blow with the axe on the head of the deceased. Moreover, all the witnesses had been assaulted, hence when the attack was going on it was not possible

for each witness to specifically observe as to the number of blows inflicted on the other witnesses, as they would all be occupied in trying to save themselves.

28. The contention that the discovery panchnama has not been proved and that the FSL report has not been obtained has to be merely stated to be rejected. In a case like the present one where the prosecution case is fully established by the direct testimony of the eyewitnesses which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief.

29. The last contention advanced by the learned counsel for the appellant is that this is a case of a single blow, which has proved to be fatal, hence, the offence committed would be one amounting to culpable homicide not amounting to murder. The law in this regard is well settled. In the case of ***State of Rajasthan v. Dhool Singh***, (2004)12 SCC 546, wherein the High Court had found that the prosecution had not established that the respondent had acted with an intention of causing death of the deceased, the Apex Court noted that the same was based on the fact that the respondent had dealt a single blow, which according to the High Court, took the act of

the respondent totally outside the scope of Exception I to Section 300, IPC. Disagreeing with the findings of the High Court, the Supreme Court held that the number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of the body where it is caused, the weapon used in causing such injury, which are the indicators of the fact whether the respondent caused the death of the deceased with an intention of causing death or not. Applying the aforesaid principle to the facts of the present case, considering the choice of weapon, namely an axe which is a lethal weapon; the vital part of the body on which the blow was inflicted, namely the back of the head; the intensity of the blow which has resulted in a brain matter deep wound; any reasonable person with any stretch of imagination can come to the conclusion that such injury on such a vital part of the body with such a weapon would cause death. The injury sustained by the deceased not only exhibits the intention of the appellant in causing the death of the victim, but also the knowledge of the appellant as to the likely consequence of such attack which could be none other than causing the death of the victim. Moreover, the learned advocate for the appellant has not stated any circumstance so as point out the applicability of benefit of

any of the Exceptions to Section 300, IPC. In the circumstances, the contention raised by the learned advocate for the appellant that this is a case of a solitary blow, hence, the same amounts to culpable homicide not amounting to murder, cannot be accepted.

30. The cumulative effect of the discussion we have made above is that the prosecution has by leading cogent and reliable evidence established its case against the appellant. We, therefore, agree with the findings and conclusions arrived at by the learned Additional Sessions Judge in holding the appellant guilty and sentencing him as stated hereinabove.

31. For the above reasons we confirm the conviction of the appellant under sections 302 and 324 of the Indian Penal Code and dismiss the appeal.

[A.M.KAPADIA, J.]

[HARSHA DEVANI, J.]

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